No. 16-2036

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Appellee,

v.

RALEIGH RESTAURANT CONCEPTS, INC., d/b/a THE MEN'S CLUB OF RALEIGH,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA (WESTERN DIVISION)

REPLY BRIEF OF RESPONDENT-APPELLANT IN RESPONSE TO BRIEF OF PETITIONER-APPELLEE

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Respondent-Appellant Raleigh Restaurant Concepts ("RRC") respectfully submits its Reply Brief in response to the Brief of Petitioner-Appellee National Labor Relations Board ("Board") ("Opposition Brief"). In this case, the District Court erroneously granted the Board's Petition for Enforcement of the Subpoena in connection with an investigation the Board lacks authority to pursue. The Board's Opposition Brief contends "[t]his is a straightforward subpoena enforcement matter." (Opposition Brief, at 6). The Board seemingly ignores that the issue at the heart of this "straightforward subpoena enforcement matter" – the legality of class/collective action waivers contained in arbitration agreements under the National Labor Relations Act ("NLRA") – is: (1) the subject of **five** petitions for writs of certiorari pending before the United States Supreme Court (including two filed by the Board); and (2) primed for this Court's review in a matter in which oral argument is scheduled for December 7, 2016. Thus, at the very least, this case should be held in abeyance pending the outcomes of the Supreme Court's and this Court's reviews of the central issue in this case.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY FAILED TO ADJUDICATE A PURE QUESTION OF LAW IN RRC'S FAVOR

Putting aside the Board's wisdom in expending limited resources seeking enforcement of the instant subpoena *duces tecum* when there is a possibility

that this Court and/or the Supreme Court may ultimately determine that class/collective action waivers contained in arbitration agreements do not violate the NLRA, the Board's arguments contained in its Opposition Brief miss the mark. Should either this Court or the Supreme Court rule against the Board, the Board cannot then seriously contend it still possesses the authority to seek enforcement of the subpoena *duces tecum* at issue in this case. Rather, the Board's continued pursuit of this matter would be "obviously apocryphal." United States v. Am. Target Advert., Inc., 257 F.3d 348, 354 (4th Cir. 2001)(internal citations omitted). As a result, while the Board's claim that "subpoena enforcement proceedings are not the appropriate venue for litigating merits issues" (Opposition Brief, at 12) may be appropriate in some cases, it is not here because the Board's underlying theory driving this litigation may soon have absolutely no sustenance.

Nevertheless, in its Opposition Brief, the Board noted:

> Disagreements between the Board and the circuits about issues of statutory interpretation are frequent, as has occurred with the issue of collective litigation waivers. RRC's argument suggests that any disagreement as to NLRA liability should require the halting or ending of the Board's investigative processes. Clearly, this would greatly inhibit the Board's ability to remedy unfair labor practices and encourage lengthy subpoena enforcement litigation.

(Opposition Brief, at 15-16). Of course, what this statement ignores is that the Board has filed two petitions for writs of certiorari which are pending before the Supreme Court seeking review of the central issue in this case. See NLRB v. Murphy Oil

USA, Inc., petition for cert. pending, No. 16-307 (filed Sept. 9, 2016); NLRB v. 24 Hour Fitness USA, Inc., petition for cert. pending, No. 16-689 (filed November 23, 2016). The Board cannot have it both ways. It should not be permitted to pursue the instant subpoena enforcement action while simultaneously attempting to legitimize the basis for this pursuit before the Supreme Court. Abeyance is warranted given this conflict.

Additionally, the Board has repeatedly chided RRC for requesting that both this Court and the District Court hold this case in abeyance pending the outcome of this Court's decision in AT&T v. NLRB, 16-1099, and the Supreme Court's determinations with respect to the multiple petitions for writs of certiorari discussed supra. The Board takes the view that RRC is attempting to "throw a roadblock into the Board's subpoena enforcement and unfair labor practice proceedings…." (Opposition Brief, at 16). Such a claim is especially disingenuous given that in the petition for a writ of certiorari filed in NLRB v. 24 Hour Fitness USA, Inc., **the same Board** made the following request of the Supreme Court:

> The Court should hold the petition in this case pending its disposition of [*NLRB v. Murphy Oil USA, Inc.*, No. 16-307] and the other petitions presenting variants of the same question presented (*i.e.*, *Patterson v. Raymours Furniture Co.*, No. 16-388; *Ernst & Young, LLP v. Morris*, No. 16-300; and *Epic Systems Corp. v. Lewis*, No. 16-285) and then dispose of this case accordingly.

The Board's hypocrisy in this regard is troubling. Nevertheless, the Board's position in NLRB v. 24 Hour Fitness echoes the point RRC has been making

all along: this case should be held in abeyance so all interested parties can ascertain whether the Board's investigative power is justified under these circumstances. As a result, this Court should reverse the District Court's order or, at the very least, hold this case in abeyance pending the outcome of the other matters discussed supra.

II. THE DISTRICT COURT IGNORED THE FACT THAT THE SUBPOENA SEEKS IRRELEVANT AND REDUNDANT INFORMATION

The Board's Opposition Brief explains its justification for requesting the subpoenaed information as follows:

> Both the subpoenaed leases and the work rules are relevant to determining whether and to what extent the class and collective action waivers are currently being maintained or enforced, which goes directly to whether RRC has violated the Act by unlawfully maintaining or enforcing class litigation waivers. Additionally, the leases and work rules are also relevant in determining if RRC is continuing to violate the Act by enforcing unlawful agreements or work rules against Holden and other individuals….
>
> Further, the leases would identify potential witnesses who could provide evidence about the waivers. These employees could verify or dispute the evidence gathered during the NLRB's investigation to date, and assist in determining if RRC's waivers and policies are applied in a manner that violates the NLRA.

(Opposition Brief, at 17-18) (internal citations omitted). The Board also notes that RRC's reliance "on its own representations that the documents do not contain pertinent information and [do] not apply to Holden" are insufficient because "such self-serving representations by an employer or counsel cannot serve to halt a Board investigation." (Opposition Brief, at 19).

The Board is wrong on both accounts. First, as noted above, the legality of class/collective action waivers contained in arbitration agreements under the NLRA is an open question which should be resolved before the Board attempts to conduct any further investigation in this case. Second, the Board scolds RRC for relying upon "self-serving representations" that the documents requested via the subpoena *duces tecum* are irrelevant. However, the Board simultaneously asserts, without any basis, that these documents contain information helpful to its misguided investigation. What is clear is that the Board is attempting to engage in a fishing expedition which this Court should not permit.

CONCLUSION

For the foregoing reasons, and those set forth in Respondent-Appellant's opening brief, the District Court erred in granting the Board's Application for an Enforcement of the April 30, 2015, Subpoena. The District Court's order should thus be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 1,150 words, as counted by the word processing system used to prepare it, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2016, I caused to be served a true and correct copy of the within and foregoing **REPLY BRIEF OF RESPONDENT-APPELLANT** via the Court's electronic case filing system which will automatically serve the following counsel of record:

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I hereby certify that on December 2, 2016, I caused to be served a true and correct copy of the within **REPLY BRIEF OF RESPONDENT-APPELLANT** via U.S. Mail with sufficient postage thereon to reach its destination to the following counsel of record:

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